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JAMES H. McKENNEY,
Clerk

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IN THE

SUPREME COURT

OF THE UNITED STATES.

Filed April 15, 1901.

IN THE MATTER OF THE APPLICATION

of

WILLIAM F. STONE, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF BALTIMORE, MARYLAND,

Respondent herein,

against

MILTENBERGER LAWDER, PERCY M. LAWDER AND W. WARD LAWDER, COPARTNERS, TRADING AS S. M. LAWDER & SONS,

Petitioners herein.

PETITION FOR WRIT OF CERTIORARI.

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2

PETITION OF MILTENBERGER LAWDER, PERCY M. LAWDER AND W. WARD LAWDER FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT, IN THE ABOVE-ENTITLED MATTER. 3

To the Honorable the Supreme Court of the United States:

The petition of Miltenberger Lawder, Percy M. Lawder and W. Ward Lawder respectfully shows to the Court:

4 That the petitioners are fruit importers, trading under the name of S. M. Lawder & Sons. During the spring or early summer of 1897 they imported several cargoes of pineapples from Governor's Harbor, B. W. I., to the Port of Baltimore, invoiced as a certain number of dozens. At that time the Tariff Act of 1894 was in effect, under which pineapples were subject to a duty of 20% *ad valorem*.

Upon the discharge of the cargoes, at Baltimore, after the pineapples had been taken out, there remained, in the holds of the ships, a mass of decaying slush and pineapple tops, mixed with bilge water and other debris of the cargo, which the customs inspect-
5 ors reckoned and counted as part of the cargo, and on which the duty of 20% was assessed. This mass of slush, being a menace to public health, was shovelled onto a scow, taken down the river and dumped overboard. The pineapples alleged by the inspectors to be contained in this slush were absolutely uncountable, and their number was roughly estimated by the inspectors. The number so estimated was less than 10% of the total invoice, and the Collector claiming it to be a case of damage to the cargo, within the meaning of Section 23 of the Customs Administrative Act of June 10, 1890, assessed duty on the whole number of pineapples estimated by
6 the inspectors to be contained in the cargo, which included the pineapples so destroyed. This quantity of slush was commercially valueless.

The importers duly protested against the payment of duty on such pineapples as were not landed or received by them but were estimated by the inspectors to be contained in this worthless matter. The Board of General Appraisers reversed the action of the Collector, and handed down an opinion, by General Appraiser Somerville, dated July 26th, 1898, holding that the importers were not liable to the

payment of duty on the portion of the cargo that 7
had been destroyed in *transitu*.

The Collector thereupon appealed from the decision of the Board of General Appraisers, to the United States Circuit Court for the District of Maryland, which, after a hearing before District Judge Morris, affirmed the decision of the Board of General Appraisers, by its decree duly filed the 17th day of July, 1899.

From the decree of the Circuit Court the Collector appealed to the United States Circuit Court of Appeals in the Fourth Circuit, which, on May 1st, 1900, rendered a decision reversing the decision appealed from, and affirming the action of the Collector. 8

The precise proposition involved in this case, presented to and passed upon by the United States Circuit Court of Appeals, was whether the pineapples thus destroyed should be treated as never having been imported, or as a damaged part of the cargo and within the provisions of Section 23 of Chapter 407 of the Act of June 10th, 1890, which provides:

> "That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; 9
> but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice and be relieved from the payment of the duties on the portion so abandoned; provided that the portion so abandoned shall amount to ten per centum, or over, of the total value or quantity of the invoice; and the portion so abandoned shall be sold by public auction or otherwise disposed of for the account and credit

10 of the United States under such regulations as the Secretary of the Treasury may prescribe."

The Collector decided that the importations came within the foregoing section, and the decision of the United States Circuit Court of Appeals has affirmed the Collector's action.

The petitioners concede that the number of pineapples on which the duty was assessed was shipped from the port of exportation, and was originally part of the cargo. But they contend that the Government does not base its right to collect duties on the fact that goods have been shipped from a foreign port,
11 destined for a port of the United States, and that the only foundation for the imposition of a duty is that the goods are brought into this country for consumption here. If the portion of the cargo destroyed had been thrown overboard before the ship arrived, there could be no question of payment of duty. And should a different rule be applied because it was inexpedient or impossible to separate the worthless portion of the cargo before reaching port? It could not have been the intention of Congress to demand from an importer a duty on goods never brought into this country. And goods having no physical existence,
12 in species, and no identity, and having lost all resemblance to their original form, and which, on arrival, are in such a condition that they cannot be discharged in any port, cannot be classed as goods brought into this country.

In deciding this case under Section 23 of the Act of June 10th, 1890, it is submitted that the Court overlooked the well settled rule that duty shall only be paid on the quantity of goods actually imported, or as stated in S.S. 12184, "the Tariff Act prescibes rates of duty to be exacted on articles 'imported from foreign countries'; but no merchandise which

does not arrive in a port of entry can be treated as 13
imported." It is conceded that if the pineapples were brought into the country in a damaged condition, so that they were reduced in value, being less than 10% of the whole invoice, they would be subject to the duty. But the number of pineapples received was several thousand less than the number stated on the invoice, and the Collector accounted for the missing number as being contained in a mass of decaying vegetable matter, bilge water and other debris taken from the hold of the ship, and collected duty on that worthless mass as pineapples imported into the United States.

An "imported" article, as the the word is used 14
in the tariff act, is defined as an article brought or carried into this country from abroad. The actual quantity of merchandise imported determines the amount of duty, and not the original quantity bought and shipped. The pineapples that had been reduced to slush had ceased to be merchandise of any kind before the cargo arrived at the port of entry.

In the case of goods that by reason of inherent qualities have become altered in character during a voyage, so that their value is increased, it is well settled that duty will be assessed on the increased value (Reiss *v.* Magone, 39 Fed., 105). 15

In importations of this character it is the practice of the Government in assessing the duty to count the number of pineapples contained in the cargo. And in these importations the duty was assessed, not on the quantity in bulk as called for by the invoice, but on the number of pineapples actually received, as counted by the inspectors, and in addition, the number estimated by the inspectors to be contained in the slush. Without doubt, if the number so estimated by the inspectors to have been con-

16 tained in the cargo had exceeded the number called for by the invoice, the importers would have been called upon to pay duty on such estimated increased amount of cargo.

In T. D. 21525 the same rule is stated, that "it is well settled in the construction of the tariff act that duties shall be imposed only on the quantity of merchandise actually imported, and not necessarily upon that specified in the entry, even though the invoiced quantity exceeds the actual amount."

On this same point the United States Supreme Court has said, in the case of Marriott *v.* Brune (9 How., 619):

17 "The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here. That is, what is imported—for nothing is imported till it comes within the limits of a port. * * * As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the Custom House; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are
18 unable to see any principle of public policy which requires the words of the Act of Congress to be extended so as to embrace more. * * *

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. * * *

"Consequently, where a portion of the shipment in cases like these does not arrive here, and hence does not come under the pos-

session and cognizance of the Custom House officers, it cannot, as heretofore shown, be taxed on any ground of law, or of truth and propriety, and does not, therefore, require for its exemption any positive enactment by Congress.

> "Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship, or by fire, or piracy, or larceny, or barratry, or a sale and delivery on the voyage, or by natural decay. If there be a material loss, it can make no difference to the sufferer or the Government whether it happened by natural or artificial causes. In either case, the article to that extent is not here to be assessed, nor to be of any value to the owner."

After referring to cases in which duties had been refunded or remitted where the goods actually arrived here and were destroyed by fire before the packages had been opened and entered into the consumption of the country, the Court said:

> "But much more should duties not be exacted on what was lost or destroyed on its way hither, and which never came even into the possession or control of the Custom House officers, and much less into the use of the community."

The decision in Marriott *v.* Brune was affirmed in United States *v.* Southmayd, 9 How., 637, and in the latter case it was also held that the fact that the seller of sugars abroad takes into consideration the probable loss from damage during the voyage does not justify the Collector in our ports in charging a duty upon the portion thus lost; that the duty must be assessed upon what arrives in this country, and

not upon what was purchased abroad. The Court said:

> "The duty here is regulated by law, and not by any estimates of such a character by men of business; and by law it is imposed on the quantity entered here, and not the quantity shipped abroad; and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners."

In Balfour *v.* Sullivan, 17 Fed., 231, it was said:

> "Duties are levied under the statute, and
> "the decision of the Supreme Court construing the statute, upon the amount of goods
> "pactually imorted."

In that case a cargo of coke, imported from Wales, by reason of evaporation of the moisture contained in it during the voyage, weighed several tons less when received than when shipped. It was held that duties could only be legally collected on the actual weight at the time of importation, and not on the weight shown by the invoice.

And in Lawrence *v.* Caswell, 13 How., 488, it was held that a duty of 100% *ad valorem* upon brandy ought to be charged only upon the quantity actually imported, and not on the contents stated in the invoices.

The question was also considered and decided in the case of Weaver & Sterry *v.* Saltonstall, 38 Fed., 493. In that case the plaintiffs imported into the port of Boston, from Italy, 1,800 boxes of castile soap. After its arrival and entry at the custom house the soap was submitted to an examination by a weigher, who reported the weight to be 70,286 pounds, while the invoice made at the time of the shipment of the soap from Italy showed the weight at the time of exportation to have been 92,983

pounds. The plaintiffs claimed that duty should 25
have been exacted only upon the value and amount as shown by the weigher's return to have been actually imported, but duty was imposed upon the entire value and amount as stated in the invoice to have been shipped. The action was brought to recover the excess of duties so exacted by the Collector. Judge Colt, in his opinion, said:

> "It seems to me that the courts have determined this question in favor of the importer. In principle I cannot distinguish this case from Marriott *v.* Brune, 9 How., 619; U. S. *v.* Southmayd, *Id.*, 637; Austin *v.* Peaslee, 20 Law Rep., 443. * * * In Mar- 26
> riott *v.* Brune it was held that the true construction of the law is to assess duty only upon the quantity of sugar and molasses which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. This doctrine was affirmed in U. S. *v.* Southmayd and in Austin v. Peaslee. The last paragraph of Section 2900, Rev. St., forbidding the assessment of duties upon an amount less than the invoice value, is substantially the same as the proviso contained in Section 9 of the Act of 1846 (9 St. at Large, 43). In Marriott *v.* Brune it 27
> is held that the decision is not inconsistent with the proviso in Section 9 of the Act of 1846, because the proviso refers only to the price, and not to the quantity. Such being the construction put upon the law by the Supreme Court and the Circuit Court of this circuit, the Collector should have assessed duties only upon the quantity of soap which arrived in port, and not upon the quantity which appears by the invoice to have been shipped; and the plaintiff is entitled to a

judgment for the excess of duties so exacted. Judgment for plaintiff."

In American Sugar Refining Co. *v.* United States, 91 Fed., 646 (January 21st, 1899), it was shown that a cargo of moist or green sugar imported from Brazil had decreased in weight from drainage and evaporation at the time it reached the port of entry, thereby increasing the market value per pound. The General Appraisers decided that in determining the market value of the sugar such increase in value should be considered, and duty assessed accordingly. In affirming the decision of the General Appraisers the United States Circuit Court for the Southern District of New York said:

> "Owing to drainage, there are less pounds of sugar on arrival here than when the ship left Brazil, but the cargo is actually worth as much as when it started. It appears, therefore, that, if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so I do not think the importers should gain by the decrease in weight coupled with an increase in value per pound. * * * This construction is supported by the statement of Mr. Justice Curtis in Austin *v.* Peaslee (2 Fed. Cas., 235), that 'the merchant is to pay duties on what is actually imported, not what is put up for export in the foreign country'; and of Judge Colt in Weaver *v.* Saltonstall, 38 Fed., 483, that the true construction of the law is to assess duty only upon the quantity which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. * * * ."

It is submitted that this is a case of loss by acci- 31
dent during the voyage, and not a case of damage under Section 10 of the Act of 1890, and is properly to be considered as within the provisions of Article 922 of the Customs Regulations of 1892, which provides:

> "No allowance will be made in the estimate of duties for lost or missing packages appearing on the invoice, unless shown by proof satisfactory to the Collector and naval officer not to have been originally laden on board, or to have been lost or destroyed by accident during the voyage."

32

There is no question but that all the facts in relation to the importations were before the Collector.

There is no definition of the word damage that would include a total destruction of value. A mass of slush, even though containing a quantity of pineapple tops, cannot correctly be called a lot of damaged pineapples. There is nothing to point out to which damage has been done. There is no original article lessened in value, as is necessarily implied in the term "damaged." A cargo reduced in quantity or amount is not a damaged cargo. On such of the cargo as had actual existence, and was actually landed at the port of Baltimore, no claim 33
is made for a refund of duty.

The intent of Congress was plainly to use the word "damage" according to the accepted and ordinary definition, and not as having any technical meaning. The section provides that no allowance shall be made for damage to goods, etc., imported into the United States, but that the importer may abandon to the Government the cargo, or any part of it, provided that the abandoned portion shall amount to 10% or more of the whole invoice, to be sold or disposed of for the account and credit of the

Government. No claim is made here for damage to goods "imported into the United States," to bring it within this section, nor on any damaged goods that could be abandoned to the Government. Reading the entire section, the intent obviously was that the subject of an abandonment should be something that could be disposed of for the account of the Government, something of value, and that had been, to a greater or less degree, reduced in value. A thing totally destroyed and utterly valueless could hardly have been intended to be abandoned to the Government as a source of revenue. To constitute damaged pineapples there must be pineapples in existence to be damaged. To constitute an absolute loss of the goods absolute annihilation was not essential. The form and species and entire value of the pineapples had been destroyed. The duty imposed is 20% on the value of pineapples, and where the pineapples have ceased to exist, and ceased to have any value, there is nothing on which duty can be assessed.

In the matter of Thomas B. Schall, G. A., 656, decided by the Board of General Appraisers June 6th, 1891, the point here presented was considered. In a cargo of oranges the number delivered fell short 35,700, and a quantity of "rots and slush" was brought on deck and removed within twenty-four hours, in accordance with the health regulations of the City of Baltimore. The Collector and naval officer reported that he was satisfied by proof that the oranges became rotten and worthless on the voyage, and never went into consumption. It was held that it was proper for the Collector to make allowance therefor in the liquidation of duty upon the entry, citing Article 609 of the General Regulations (now Article 922 of the Customs Regulations of 1892), providing that an allowance should be made for lost or missing articles when it is satis-

factorily proved to the Collector and naval officer 37
that they were lost or destroyed by accident during the voyage. The Board said: "Loss of fruit by "decay may reasonably be held to be an acci- "dent, it being a loss by a contingency, chance or "casualty."

The precise question involved in the pending case was considered and decided in the case of Shaw *v.* Dix, 72 Fed. Rep., 106.

In that case the importers brought into the port of Baltimore two cargoes of cocoanuts in bulk, invoiced at specified prices per thousand. When the cargo was discharged the number of cocoanuts fell short of the number invoiced, and the shortage the 38
Government officers estimated to be contained in a mass of broken and rotten cocoanuts, not countable, and of no value, and the importers were required to have it carted off and thrown away.

The Collector assessed duty on the whole number of cocoanuts specified in the invoices, deciding that Section 23 of the Act of June 10th, 1890, was applicable, and that the shortage was a damage to the merchandise for which no allowance could be made, as it did not amount to 10%, and relying on the decision in U. S. *v.* Bache, 59 Fed. Rep., 762.

The Board of General Appraisers reversed the action of the Collector, and on an appeal to the 39
United States Circuit Court for the District of Maryland the decision of the Board of General Appraisers was sustained. Judge Morris, in his opinion, says:

> "It is quite true that the allowance for damage to imported goods is expressly regulated by Section 23 of the Act of June 10th, 1890, but it is true now, as it was before that Act was passed, that duty is not to be assessed on an article which does not ar-

40 rive in this country (citing Marriott *v.* Brune, 9 How., 619). As to perishable fruits imported in boxes, cases or bags, and of which some in each package decay during the voyage, it may be held that the loss cannot be ascertained except by an estimate of the loss of value to each package by the decay of some of its contents, and as the invoice would call for so many packages, it might fairly be said that all the packages were imported, but in a damaged condition and of an impaired value. In such a case, no doubt, Section 23 would apply. But if any packages were broken up
41 and the contents reduced to a worthless mass, it could not be fairly said that those packages arrived at all, or that duty could be exacted in respect to them. With respect to cocoanuts imported in bulk, it would appear that those which rotted and were broken up on the voyage and become mere worthless debris in the hold of the ship, are a total loss. They are not a damage to the value of what remains, but they lessen the number which the importer receives. If this worthless material could be separated from the cargo while at sea and thrown overboard, the importer
42 would be better of, because he would be saved the expense of having the stuff hauled away to the dump after the cargo is discharged."

In distinguishing that case from U. S. *v.* Bache, relied on by the Collector, Judge Morris says:

> "In U. S. *v.* Bache, 59 Fed. Rep., 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed,

but were damaged. It was clearly a case 43
within the language of Section 23, and no question would have arisen but for the fact that broken 'glass fit only to be remanufactured,' was by law exempt from duty and admitted free. The importer claimed that as during the voyage a portion of each case became broken glass, its character as merchandise was changed and it became an article specifically exempted from duty, and entitled to come in free, and that it made no difference that the dutiable and nondutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on 44
the merchandise as it came into this country, and not as it was when it was put aboard the ship in the foreign port. It was held by the Circuit Court of Appeals for the Second Circuit that Congress having enacted a general statutory system for the ascertainment of the damage to imported goods and for allowance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by Congress to take the one article of 45
glass out of the general system."

And in discussing the question of what would constitute a proper subject of abandonment, it was said:

> "I think it is clear that the Board of General Appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being im-

46 paired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and when the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the Act of 1890 is not inconsistent with the general provisions of Section 2921 of the Revised Statutes, nor with Sections 906 and 922 of the General Regulations, providing that, if the quantity which arrives is less than the invoice, there
47 can be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of debris remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small boats, through the surf, so that it is not possible to say with any accuracy what
48 number the mass of debris did represent. It is quite manifest that there is no ground for the contention that Section 23 is applicable to this case. The decision of the Board of General Appraisers is sustained."

Your petitioners, therefore, contend that the Circuit Court of Appeals erred in holding that the destruction of part of the cargo should be treated as a case of damage to the cargo, and that your petitioners were liable for duties on pineapples not re-

ceived by them and not entered, and which were a 49
total loss before arriving at the port of entry.

The point is one frequently arrising in relation to importations into the port of Baltimore, as well as other ports in the United States, and your petitioners submit that it is of the utmost importance to the importers, and will as well be of the greatest assistence to the collectors, that there should be a final adjudication of this Court, determining whether articles that by reason of destruction in transit are never brought into the United States, and never received by the importer, should nevertheless be subject to a duty as damaged merchandise. 50

Your petitioners present herewith to this Court and file a duly certified copy of the entire record of the lower Court in the case, as the same appears in the United States Circuit Court of Appeals, and pray that the writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals of the United States for the Fourth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the above-entitled action, to the end that this said case may 51
be reviewed and determined by this Court as provided by Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891."

And your petitioners pray that the said judgment of said Circuit Court of Appeals be reversed and the cause remanded, with instructions to enter

52 a judgment in favor of your petitioners and against William F. Stone, Collector, etc.

And your petitioners will ever pray, etc.

PERCY M. LAWDER,
MILTENBERGER LAWDER,
W. WARD LAWDER,
Petitioners.

Edw. S. Hatch

Counsel for Petitioners,
100 Broadway,
53 New York City.

UNITED STATES OF AMERICA,
District of Maryland,
City of Baltimore, } ss.:

PERCY M. LAWDER, being duly sworn, says: That he is a member of the firm of S. M. Lawder & Sons, and one of the petitioners above named, and subscribed the foregoing petition. That he has read the foregoing petition and knows the contents thereof, and the facts therein stated are true to the knowledge of deponent.

54

PERCY M. LAWDER.

Sworn to before me this 2d day of April, 1901.

N. F. BURKE,
Notary Public.

Certificate of Counsel.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that in my opinion the same is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

EDW. S. HATCH,
Counsel for Petitioner.

To

JOHN S. ROSE, Esq.,
United States Attorney for the District of Maryland.

Please take notice, that on the 22d day of April, 1901, on the opening of court, or as soon thereafter as the matter can be heard, I shall move the Supreme Court of the United States, at the court-room thereof, in the City of Washington, D. C., that the foregoing petition for a writ of certiorari be granted.

Dated New York, April 3d, 1901.

EDW. S. HATCH,
Counsel for Petitioner.

Service of above notice and receipt of a copy thereof, together with copy of the petition, are hereby admitted at Baltimore, Md., this 6th day of April, 1901.

John C. Rose
U. S. Attorney for the
District of Maryland.